Supreme Court, U.S.
F I L E D
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No. 99-417

IN THE

# Supreme Court of the United States

LAWRENCE EPSTEIN, *et al.*,

*Petitioners,*

*v.*

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## APPENDIX

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## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The Supreme Court Of The United States Dated And Decided February 27, 1996 ..... 1a

Appendix B — Order And Final Judgment Of The Court Of Chancery Of The State Of Delaware In And For New Castle County Dated February 22, 1993 And Filed February 23, 1993 ..... 39a

Appendix C — Excerpts From Transcript Of Argument On Plaintiffs' Application For Approval Of A Settlement And Attorneys' Fees Of The Court Of Chancery Of The State Of Delaware In And For New Castle County Dated January 21, 1993 ..... 43a

Appendix D — Amended Stockholders' Class Action Complaint Dated And Filed December 14, 1990 ..... 47a

## APPENDIX A — OPINION OF THE SUPREME COURT OF THE UNITED STATES DATED AND DECIDED FEBRUARY 27, 1996

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., et al., Petitioners,

v.

Lawrence EPSTEIN et al.

No. 94-1809.

Supreme Court of the United States

Argued Nov. 27, 1995.

Decided Feb. 27, 1996.

* * *

Justice THOMAS delivered the opinion of the Court.

This case presents the question whether a federal court may withhold full faith and credit from a state-court judgment approving a class-action settlement simply because the settlement releases claims within the exclusive jurisdiction of the federal courts. The answer is no. Absent a partial repeal of the Full Faith and Credit Act, 28 U.S.C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered.

I

In 1990, petitioner Matsushita Electric Industrial Co. made a tender offer for the common stock of MCA, Inc., a

Delaware corporation. The tender offer not only resulted in Matsushita's acquisition of MCA, but also precipitated two lawsuits on behalf of the holders of MCA's common stock. First, a class action was filed in the Delaware Court of Chancery against MCA and its directors for breach of fiduciary duty in failing to maximize shareholder value. The complaint was later amended to state additional claims against MCA's directors for, *inter alia*, waste of corporate assets by exposing MCA to liability under the federal securities laws. In addition, Matsushita was added as a defendant and was accused of conspiring with MCA's directors to violate Delaware law. The Delaware suit was based purely on state-law claims.

While the state class action was pending, the instant suit was filed in Federal District Court in California. The complaint named Matsushita as a defendant and alleged that Matsushita's tender offer violated Securities Exchange Commission (SEC) Rules 10b-13 and 14d-10.[1] These Rules were created by the SEC pursuant to the 1968 Williams Act Amendments to the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, as amended, 15 U.S.C. § 78a *et seq*. Section 27 of the Exchange Act confers exclusive jurisdiction upon the federal courts for suits brought to enforce the Act or rules and regulations promulgated thereunder. See 15 U.S.C. § 78aa. The District Court declined to certify the class, entered summary judgment for Matsushita, and dismissed the case. The plaintiffs appealed to the Court of Appeals for the Ninth Circuit.

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1. We express no opinion in this case on the existence of a private cause of action under §§ 14(d)(6) and (7) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(d)(6) and (7), the statutory authority for Rule 14d-10.

*Appendix A*

After the federal plaintiffs filed their notice of appeal but before the Ninth Circuit handed down a decision, the parties to the Delaware suit negotiated a settlement.[2] In exchange for a global release of all claims arising out of the Matsushita-MCA acquisition, the defendants would deposit $2 million into a settlement fund to be distributed pro rata to the members of the class. As required by Delaware Chancery Rule 23, which is modeled on Federal Rule of Civil Procedure 23, the Chancery Court certified the class for purposes of settlement and approved a notice of the proposed settlement. The notice informed the class members of their right to request exclusion from the settlement class and to appear and present argument at a scheduled hearing to determine the fairness of the settlement. In particular, the notice stated that "[b]y filing a valid Request for Exclusion, a member of the Settlement Class will not be precluded by the Settlement from individually seeking to pursue the claims alleged in the . . . California Federal Actions, . . . or any other claim relating to the events at issue in the Delaware Actions." App. to Pet. for Cert. 96a. Two such notices were mailed to the class members and the notice was also published in the national edition of the Wall Street Journal. The Chancery Court then held a hearing. After argument from several objectors, the Court found the class representation adequate and the settlement fair.

The order and final judgment of the Chancery Court incorporated the terms of the settlement agreement, providing:

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2. A previous settlement was rejected by the Court of Chancery as unfair to the class. See *In re MCA, Inc. Shareholders Litigation*, 598 A.2d 687 (1991).

*Appendix A*

> "All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities law, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (*other than those who have validly requested exclusion therefrom*), . . . in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement . . . *and including without limitation the claims asserted in the California Federal Actions* . . . are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment." *In re MCA, Inc. Shareholders Litigation*, C.A. No. 11740 (Feb. 22, 1993), reprinted in App. to Pet. for Cert. 74a-75a (emphasis added).

The judgment also stated that the notice met all the requirements of due process. The Delaware Supreme Court affirmed. *In re MCA, Inc., Shareholders Litigation*, 633 A.2d 370 (1993) (judgt. order).

Respondents were members of both the state and federal plaintiff classes. Following issuance of the notice of proposed settlement of the Delaware litigation, respondents neither

opted out of the settlement class nor appeared at the hearing to contest the settlement or the representation of the class. On appeal in the Ninth Circuit, petitioner Matsushita invoked the Delaware judgment as a bar to further prosecution of that action under the Full Faith and Credit Act, 28 U.S.C. § 1738.

The Ninth Circuit rejected petitioner's argument, ruling that § 1738 did not apply. *Epstein v. MCA, Inc.*, 50 F.3d 644, 661-666 (1995). Instead, the Court of Appeals fashioned a test under which the preclusive force of a state-court settlement judgment is limited to those claims that "could . . . have been extinguished by the issue preclusive effect of an adjudication of the state claims." *Id.*, at 665. The lower courts have taken varying approaches to determining the preclusive effect of a state-court judgment, entered in a class or derivative action, that provides for the release of exclusively federal claims.[3] We granted certiorari to clarify this important area of federal law. 515 U.S. 1187 (1995).

II

The Full Faith and Credit Act mandates that the "judicial proceedings" of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The Act thus directs

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3. Compare the decision below with *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (CA3), cert. denied, 513 U.S. 986 (1994); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (CA1 1991); and *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759 (CA2 1968).

all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State. Federal courts may not "employ their own rules . . . in determining the effect of state judgments," but must "accept the rules chosen by the State from which the judgment is taken." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-482 (1982). Because the Court of Appeals failed to follow the dictates of the Act, we reverse.

A

The state court judgment in this case differs in two respects from the judgments that we have previously considered in our cases under the Full Faith and Credit Act. As respondents and the Court of Appeals stressed, the judgment was the product of a class action and incorporated a settlement agreement releasing claims within the exclusive jurisdiction of the federal courts. Though respondents urge "the irrelevance of section 1738 to this litigation," Brief for Respondents 25, we do not think that either of these features exempts the judgment from the operation of § 1738.

That the judgment at issue is the result of a class action, rather than a suit brought by an individual, does not undermine the initial applicability of § 1738. The judgment of a state court in a class action is plainly the product of a "judicial proceeding" within the meaning of § 1738. Cf. *McDonald v. West Branch*, 466 U.S. 284, 287-288 (1984) (holding that § 1738 does not apply to arbitration awards because arbitration is not a "judicial proceeding"). Therefore, a judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively

entitled to full faith and credit under the express terms of the Act.

Further, § 1738 is not irrelevant simply because the judgment in question might work to bar the litigation of exclusively federal claims. Our decision in *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985), made clear that where § 1738 is raised as a defense in a subsequent suit, the fact that an allegedly precluded "claim is within the exclusive jurisdiction of the federal courts *does not necessarily make § 1738 inapplicable.*" *Id.*, at 380 (emphasis added). In so holding, we relied primarily on *Kremer v. Chemical Constr. Corp.*, *supra*, which held, without deciding whether claims under Title VII are exclusively federal, that state court proceedings may be issue preclusive in Title VII suits in federal court. *Kremer*, we said, "implies that absent an exception to § 1738, state law determines at least the . . . preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." *Marrese*, 470 U.S., at 381. Accordingly, we decided that "a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts." *Id.*, at 380.

In *Marrese*, we discussed *Nash County Bd. of Ed. v. Biltmore Co.*, 640 F.2d 484 (CA4), cert. denied, 454 U.S. 878 (1981), a case that concerned a state court settlement judgment. In *Nash*, the question was whether the judgment, which approved the settlement of state antitrust claims, prevented the litigation of exclusively federal antitrust claims. See 470 U.S., at 382, n. 2. We suggested that the

approach outlined in *Marrese* would also apply in cases like *Nash* that involve judgments upon settlement: that is, § 1738 would control at the outset. See 470 U.S., at 382, n. 2. In accord with these precedents, we conclude that § 1738 is generally applicable in cases in which the state-court judgment at issue incorporates a class-action settlement releasing claims solely within the jurisdiction of the federal courts.

B

*Marrese* provides the analytical framework for deciding whether the Delaware court's judgment precludes this exclusively federal action. When faced with a state-court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment. See *id.*, at 381-382. If state law indicates that the particular claim or issue would be barred from litigation in a court of that State, then the federal court must next decide whether, "as an exception to § 1738," it "should refuse to give preclusive effect to [the] state court judgment." *Id.*, at 383. See also *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984) ("[I]n the absence of federal law modifying the operation of § 1738, the preclusive effect in federal court of [a] state-court judgment is determined by [state] law").

1

We observed in *Marrese* that the inquiry into state law would not always yield a direct answer. Usually, "a state court will not have occasion to address the specific question

whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court." 470 U.S., at 381-382. Where a judicially approved settlement is under consideration, a federal court may consequently find guidance from general state law on the preclusive force of settlement judgments. See, *e.g.*, *id.*, at 382-383, n. 2 (observing in connection with *Nash* that "[North Carolina] law gives preclusive effect to consent judgment[s]"). Here, in addition to providing rules regarding the preclusive force of class-action settlement judgments in subsequent suits in state court, the Delaware courts have also spoken to the particular effect of such judgments in federal court.

Delaware has traditionally treated the impact of settlement judgments on subsequent litigation in state court as a question of claim preclusion. Early cases suggested that Delaware courts would not afford claim preclusive effect to a settlement releasing claims that could not have been presented in the trial court. See *Ezzes v. Ackerman*, 234 A.2d 444, 445-446 (Del.1967) ("[A] judgment entered either after trial on the merits or upon an approved settlement is *res judicata* and bars subsequent suit on the same claim. . . . [T]he defense of *res judicata* . . . is available if the pleadings framing the issues in the first action would have permitted the raising of the issue sought to be raised in the second action, and if the facts were known, or could have been known to the plaintiff in the second action at the time of the first action"). As the Court of Chancery has perceived, however, "the *Ezzes* inquiry [was] modified in regard to class actions," *In re Union Square Associates Securities Litigation*, C.A. No. 11028, 1993 WL 220528, *3 (June 16, 1993), by the Delaware Supreme Court's decision in *Nottingham Partners v. Dana*, 564 A.2d 1089 (1989).

*Appendix A*

In *Nottingham*, a class action, the Delaware Supreme Court approved a settlement that released claims then pending in federal court. In approving that settlement, the *Nottingham* Court appears to have eliminated the *Ezzes* requirement that the claims could have been raised in the suit that produced the settlement, at least with respect to class actions:

> " '[I]n order to achieve a comprehensive settlement that would prevent relitigation of settled questions at the core of a class action, a court may permit the release of a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have been presentable in the class action.' " 564 A.2d, at 1106 (quoting *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (CA2 1982)).

See *Union Square*, *supra*, at *3 (relying directly on *Nottingham* to hold that a Delaware court judgment settling a class action was res judicata and barred arbitration of duplicative claims that could not have been brought in the first suit). These cases indicate that even if, as here, a claim could not have been raised in the court that rendered the settlement judgment in a class action, a Delaware court would still find that the judgment bars subsequent pursuit of the claim.

The Delaware Supreme Court has further manifested its understanding that when the Court of Chancery approves a global release of claims, its settlement judgment should

preclude ongoing or future federal-court litigation of any released claims. In *Nottingham*, the Court stated that "[t]he validity of executing a general release in conjunction with the termination of litigation has long been recognized by the Delaware courts. More specifically, the Court of Chancery has a history of approving settlements that have implicitly or explicitly included a general release, which would also release federal claims." 564 A.2d, at 1105 (citation omitted). Though the Delaware Supreme Court correctly recognized in *Nottingham* that it lacked actual authority to order the dismissal of any case pending in federal court, it asserted that state-court approval of the settlement would have the collateral effect of preventing class members from prosecuting their claims in federal court. Perhaps the clearest statement of the Delaware Chancery Court's view on this matter was articulated in the suit preceding this one: "When a state court settlement of a class action releases all claims which arise out of the challenged transaction and is determined to be fair and to have met all due process requirements, the class members are bound by the release or the doctrine of issue preclusion. Class members cannot subsequently relitigate the claims barred by the settlement in a federal court." *In re MCA, Inc. Shareholders Litigation*, 598 A.2d 687, 691 (1991).[4] We are aware of no Delaware case that suggests otherwise.

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4. In fact, the Chancery Court rejected the first settlement, which contained no opt-out provision, as unfair to the class precisely because it believed that the settlement would preclude the class from pursuing their exclusively federal claims in federal court. See *In re MCA Inc. Shareholders Litigation*, 598 A.2d, at 692 ("[I]f this Court provides for the release of all the claims arising out of the challenged transaction, the claims which the Objectors have asserted in the federal suit will likely be forever barred").

Given these statements of Delaware law, we think that a Delaware court would afford preclusive effect to the settlement judgment in this case, notwithstanding the fact that respondents could not have pressed their Exchange Act claims in the Court of Chancery. The claims are clearly within the scope of the release in the judgment, since the judgment specifically refers to this lawsuit. As required by Delaware Court of Chancery Rule 23, see *Prezant v. De Angelis*, 636 A.2d 915, 920 (1994), the Court of Chancery found, and the Delaware Supreme Court affirmed, that the settlement was "fair, reasonable and adequate and in the best interests of the . . . Settlement class" and that notice to the class was "in full compliance with . . . the requirements of due process." *In re MCA, Inc. Shareholders Litigation*, C.A. No. 11740 (Feb. 22, 1993), reprinted in App. to Pet. for Cert. 73a, 74a. Cf. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (due process for class action plaintiffs requires "notice plus an opportunity to be heard and participate in the litigation"). The Court of Chancery "further determined that the plaintiffs[,] . . . as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class." *In re MCA, Inc. Shareholders Litigation*, *supra*, reprinted in App. to Pet. for Cert. 73a. Cf. *Phillips Petroleum Co.*, *supra*, at 812 (due process requires "that the named plaintiff at all times adequately represent the interests of the absent class members").[5] Under Delaware

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5. Apart from any discussion of Delaware law, respondents contend that the settlement proceedings did not satisfy due process because the class was inadequately represented. See Brief for Respondents 34-45. Respondents make this claim in spite of the Chancery Court's express ruling, following argument on the issue, (Cont'd)

Rule 23, as under Federal Rule of Civil Procedure 23, "[a]ll members of the class, whether of a plaintiff or a defendant class, are bound by the judgment entered in the action unless, in a Rule 23(b)(3) action, they make a timely election for exclusion." 2 H. Newberg, Class Actions § 2755, p. 1224 (1977). See also *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation"). Respondents do not deny that, as shareholders of MCA's common stock, they were part of the plaintiff class and that they never opted out; they are bound, then, by the judgment.[6]

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(Cont'd)

that the class representatives fairly and adequately protected the interests of the class. Cf. *Prezant v. De Angelis*, 636 A.2d 915, 923 (Del.1994) ("[The] constitutional requirement [of adequacy of representation] is embodied in [Delaware] Rule 23(a)(4), which requires that the named plaintiff 'fairly and adequately protect the interests of the class' "). We need not address the due process claim, however, because it is outside the scope of the question presented in this Court. See *Yee v. Escondido*, 503 U.S. 519, 533 (1992). While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below. See *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

6. Respondents argue that their failure to opt out of the settlement class does not constitute consent to the terms of the settlement under traditional contract principles. Brief for Respondents 16-25. Again, the issue raised by respondents — whether the settlement could bar this suit as a matter of contract

(Cont'd)

Because it appears that the settlement judgment would be res judicata under Delaware law, we proceed to the second step of the *Marrese* analysis and ask whether § 27 of the Exchange Act, which confers exclusive jurisdiction upon the federal courts for suits arising under the Act, partially repealed § 1738. Section 27 contains no express language regarding its relationship with § 1738 or the preclusive effect of related state-court proceedings. Thus, any modification of § 1738 by § 27 must be implied. In deciding whether § 27 impliedly created an exception to § 1738, the "general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of § 1738." *Marrese*, 470 U.S., at 386. "Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action. . . . [T]he primary consideration must be the intent of Congress." *Ibid.*

As an historical matter, we have seldom, if ever, held that a federal statute impliedly repealed § 1738. See *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523-525 (1986) (Anti-Injunction Act does not limit § 1738); *Migra*

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(Cont'd)

law, as distinguished from § 1738 law — is outside the scope of the question on which we granted certiorari. We note, however, that if a State chooses to approach the preclusive effect of a judgment embodying the terms of a settlement agreement as a question of pure contract law, a federal court must adhere to that approach under § 1738. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-482 (1982).

*v. Warren City School Dist. Bd. of Ed.*, 465 U.S., at 83-85 (§ 1983 does not limit claim preclusion under § 1738); *Kremer v. Chemical Constr. Corp.*, 456 U.S., at 468-476 (Title VII of the Civil Rights Act of 1964 does not limit § 1738); *Allen v. McCurry*, 449 U.S. 90, 96-105 (1980) (§ 1983 does not limit issue preclusion under § 1738). But cf. *Brown v. Felsen*, 442 U.S. 127, 138-139 (1979) (declining to give claim preclusive effect to prior state-court debt collection proceeding in federal bankruptcy suit, without discussing § 1738, state law, or implied repeals). The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an " 'irreconcilable conflict' " between the two federal statutes at issue. *Kremer v. Chemical Constr. Corp.*, *supra*, at 468 (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)).

Section 27 provides that "[t]he district courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa. There is no suggestion in § 27 that Congress meant for plaintiffs with Exchange Act claims to have more than one day in court to challenge the legality of a securities transaction. Though the statute plainly mandates that suits alleging violations of the Exchange Act may be maintained only in federal court, nothing in the language of § 27 "remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of . . . 28 U.S.C. § 1738." *Allen v. McCurry*, *supra*, at 97-98.

Nor does § 27 evince any intent to prevent litigants in state court — whether suing as individuals or as part of a class — from voluntarily releasing Exchange Act claims in judicially approved settlements. While § 27 prohibits state courts from adjudicating claims arising under the Exchange Act, it does not prohibit state courts from approving the release of Exchange Act claims in the settlement of suits over which they have properly exercised jurisdiction, *i.e.*, suits arising under state law or under federal law for which there is concurrent jurisdiction. In this case, for example, the Delaware action was not "brought to enforce" any rights or obligations under the Act. The Delaware court asserted judicial power over a complaint asserting purely state-law causes of action[7] and, after the parties agreed to settle, certified the class and approved the settlement pursuant to the requirements of Delaware Rule of Chancery 23 and the Due Process Clause. Thus, the Delaware court never trespassed upon the exclusive territory of the federal courts, but merely approved the settlement of a common-law suit pursuant to state and nonexclusive federal law. See *Abramson v. Pennwood Investment Corp.*, 392 F.2d 759, 762 (CA2 1968) ("Although the state court could not adjudicate the federal claim, it was within its powers over the corporation and the parties to approve the release of that claim as a condition of settlement of the state action"). While it is true that the state court assessed the general worth of the federal claims in determining the fairness of the settlement, such

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7. Though the plaintiff class premised one of its claims of fiduciary breach on the allegation that MCA wasted corporate assets by exposing the corporation to liability under the federal securities laws, the cause pleaded was nonetheless a state common-law action for breach of fiduciary duty.

assessment does not amount to a judgment on the merits of the claims. See *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (CA2 1982) (" 'Approval of a settlement does not call for findings of fact regarding the claims to be compromised. The court is concerned only with the *likelihood* of success or failure; the actual merits of the controversy are not to be determined' ") (quoting Haudek, The Settlement and Dismissal of Stockholders' Actions-Part II: The Settlement, 23 Sw.L.J. 765, 809 (1969) (footnotes omitted)). The Delaware court never purported to resolve the merits of the Exchange Act claims in the course of appraising the settlement; indeed, it expressly disavowed that purpose. See *In re MCA, Inc. Shareholders Litigation*, C.A. No. 11740 (Feb. 16, 1993), reprinted in App. to Pet. for Cert. 68a ("In determining whether a settlement should be approved, a court should not try the merits of the underlying claims. This principle would seem to be especially appropriate where the underlying claims, like the federal claims here, are outside the jurisdiction of this Court" (citation omitted)).

The legislative history of the Exchange Act elucidates no specific purpose on the part of Congress in enacting § 27. See *Murphy v. Gallagher*, 761 F.2d 878, 885 (CA2 1985) (noting that the legislative history of the Exchange Act provides no readily apparent explanation for the provision of exclusive jurisdiction in § 27) (citing 2 & 3 L. Loss, Securities Regulation 997, 2005 (2d ed.1961)). We may presume, however, that Congress intended § 27 to serve at least the general purposes underlying most grants of exclusive jurisdiction: "to achieve greater uniformity of construction and more effective and expert application of that law." *Murphy v. Gallagher*, *supra*, at 885. When a state

court upholds a settlement that releases claims under the Exchange Act, it threatens neither of these policies. There is no danger that state-court judges who are not fully expert in federal securities law will say definitively what the Exchange Act means and enforce legal liabilities and duties thereunder. And the uniform construction of the Act is unaffected by a state court's approval of a proposed settlement because the state court does not adjudicate the Exchange Act claims but only evaluates the overall fairness of the settlement, generally by applying its own business judgment to the facts of the case. See, *e.g.*, *Polk v. Good*, 507 A.2d 531, 535 (Del.1986).

Furthermore, other provisions of the Exchange Act suggest that Congress did not intend to create an exception to § 1738 for suits alleging violations of the Act. Congress plainly contemplated the possibility of dual litigation in state and federal courts relating to securities transactions. See 15 U.S.C. § 78bb(a) (preserving "all other rights and remedies that may exist at law or in equity"). And all that Congress chose to say about the consequences of such litigation is that plaintiffs ought not obtain double recovery. See *ibid.* Congress said nothing to modify the background rule that where a state-court judgment precedes that of a federal court, the federal court must give full faith and credit to the state-court judgment. See *Murphy v. Gallagher*, *supra*, at 884.

Finally, precedent supports the conclusion that the concerns underlying the grant of exclusive jurisdiction in § 27 are not undermined by state-court approval of settlements releasing Exchange Act claims. We have held that state court proceedings may, in various ways, subsequently affect the litigation of exclusively federal claims without running afoul of the federal jurisdictional

grant in question. In *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929) (cited in *Marrese*, 470 U.S., at 381), we held that state court findings of fact were issue preclusive in federal patent suits. We did so with full recognition that "the logical conclusion from the establishing of [the state law] claim is that Becher's patent is void." 279 U.S., at 391. Becher reasoned that although "decrees validating or invalidating patents belong to the Courts of the United States," that "does not give sacrosanctity to facts that may be conclusive upon the question in issue." *Ibid.* Similarly, while binding legal determinations of rights and liabilities under the Exchange Act are for federal courts only, there is nothing sacred about the approval of settlements of suits arising under state law, even where the parties agree to release exclusively federal claims. See also *Brown v. Felsen*, 442 U.S., at 139, n. 10 (noting that "[i]f, in the course of adjudicating a state-law question, a state court should determine factual issues using standards identical to those of § 17, then collateral estoppel, in the absence of countervailing statutory policy, would bar relitigation of those issues in the bankruptcy court"); *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255, 258 (1897) (when a state court has jurisdiction of the parties and the subject matter of the complaint, the state court may decide the validity of a patent when that issue is raised as a defense).

We have also held that Exchange Act claims may be resolved by arbitration rather than litigation in federal court. In *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), we found that parties to an arbitration agreement could waive the right to have their Exchange Act claims tried in federal court and agree to arbitrate the claims. *Id.*, at 227-228. It follows that state-court litigants ought also to be able

to waive, or "release," the right to litigate Exchange Act claims in a federal forum as part of a settlement agreement. As *Shearson/American Express Inc.* demonstrates, a statute conferring exclusive federal jurisdiction for a certain class of claims does not necessarily require resolution of those claims in a federal court.

Taken together, these cases stand for the general proposition that even when exclusively federal claims are at stake, there is no "universal right to litigate a federal claim in a federal district court." *Allen v. McCurry*, 449 U.S., at 105. If class action plaintiffs wish to preserve absolutely their right to litigate exclusively federal claims in federal court, they should either opt out of the settlement class or object to the release of any exclusively federal claims. In fact, some of the plaintiffs in the Delaware class action requested exclusion from the settlement class. They are now proceeding in federal court with their federal claims, unimpeded by the Delaware judgment.

In the end, §§ 27 and 1738 "do not pose an either-or proposition." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992). They can be reconciled by reading § 1738 to mandate full faith and credit of state-court judgments incorporating global settlements, provided the rendering court had jurisdiction over the underlying suit itself, and by reading § 27 to prohibit state courts from exercising jurisdiction over suits arising under the Exchange Act. Cf. 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4470, pp. 688-689 (1981) ("[S]ettlement of state court litigation has been held to defeat a subsequent federal action if the settlement was intended to apply to claims in exclusive federal jurisdiction as well as other claims. . . .

These rulings are surely correct"). Congress' intent to provide an exclusive federal forum for adjudication of suits to enforce the Exchange Act is clear enough. But we can find no suggestion in § 27 that Congress meant to override the "principles of comity and repose embodied in § 1738," *Kremer v. Chemical Constr. Corp.*, 456 U.S., at 463, by allowing plaintiffs with Exchange Act claims to release those claims in state court and then litigate them in federal court. We conclude that the Delaware courts would give the settlement judgment preclusive effect in a subsequent proceeding and, further, that § 27 did not effect a partial repeal of § 1738.

C

The Court of Appeals did not engage in any analysis of Delaware law pursuant to § 1738. Rather, the Court of Appeals declined to apply § 1738 on the ground that where the rendering forum lacked jurisdiction over the subject matter or the parties, full faith and credit is not required. 50 F.3d, at 661, 666. See *Underwriters Nat. Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Assn.*, 455 U.S. 691, 704-705 (1982) (" '[A] judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits — had jurisdiction, that is, to render the judgment' ") (quoting *Durfee v. Duke*, 375 U.S. 106, 110 (1963)). The Court of Appeals decided that the subject-matter jurisdiction exception to full faith and credit applies to this case because the Delaware court acted outside the bounds of its own jurisdiction in approving the settlement, since the settlement released exclusively federal claims. See 50 F.3d, at 661-662, and n. 25.

As explained above, the state court in this case clearly possessed jurisdiction over the subject matter of the underlying suit and over the defendants. Only if this were not so — for instance, if the complaint alleged violations of the Exchange Act and the Delaware court rendered a judgment on the merits of those claims — would the exception to § 1738 for lack of subject-matter jurisdiction apply. Where, as here, the rendering court in fact had subject-matter jurisdiction, the subject-matter jurisdiction exception to full faith and credit is simply inapposite. In such a case, the relevance of a federal statute that provides for exclusive federal jurisdiction is not to the state court's possession of jurisdiction *per se*, but to the existence of a partial repeal of § 1738.[8]

* * *

The judgment of the Court of Appeals is reversed, and remanded for proceedings consistent with this opinion.

*It is so ordered.*

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8. *Kalb v. Feuerstein*, 308 U.S. 433 (1940), is not to the contrary. In that case, the federal statute at issue expressly prohibited certain common-law actions from being either instituted or maintained in state court. *Id.*, at 440-441. Thus, by merely entertaining a common-law foreclosure suit, over which it otherwise would have had jurisdiction, the state court violated the terms of the Act. That is not the situation here, where there is no contention that just by entertaining the class action the Delaware court acted in violation of federal law.

*Appendix A*

Justice STEVENS, concurring in part and dissenting in part.

While I join Parts I, II-A, and II-C of the Court's opinion, and while I also agree with the Court's reasons for concluding that § 27 of the Securities Exchange Act of 1934 does not create an implied partial repeal of the Full Faith and Credit Act, I join neither Part II-B nor the Court's judgment because I agree with Justice GINSBURG that the question of Delaware law should be addressed by the Court of Appeals in the first instance, and that the Ninth Circuit remains free to consider whether Delaware courts fully and fairly litigated the adequacy of class representation.

Justice GINSBURG, with whom Justice STEVENS joins, and with whom Justice SOUTER joins as to Part II-B, concurring in part and dissenting in part.

I join the Court's judgment to the extent that it remands the case to the Ninth Circuit. I agree that a remand is in order because the Court of Appeals did not attend to this Court's reading of 28 U.S.C. § 1738 in a controlling decision, *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). But I would not endeavor, as the Court does, to speak the first word on the content of Delaware preclusion law. Instead, I would follow our standard practice of remitting that issue for decision, in the first instance, by the lower federal courts. See, *e.g.*, *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 387 (1985).

I write separately to emphasize a point key to the application of § 1738: A state-court judgment generally is

not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause. See *Kremer*, 456 U.S., at 482-483. In the class-action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812 (1985); *Prezant v. De Angelis*, 636 A.2d 915, 923-924 (Del. 1994).

Suitors in this action (called the "Epstein plaintiffs" in this opinion), respondents here, argued before the Ninth Circuit, and again before this Court, that they cannot be bound by the Delaware settlement because they were not adequately represented by the Delaware class representatives. They contend that the Delaware representatives' willingness to release federal securities claims within the exclusive jurisdiction of the federal courts for a meager return to the class members, but a solid fee to the Delaware class attorneys, disserved the interests of the class, particularly, the absentees. The inadequacy of representation was apparent, the Epstein plaintiffs maintained, for at the time of the settlement, the federal claims were *sub judice* in the proper forum for those claims — the federal judiciary. Although the Ninth Circuit decided the case without reaching the due process check on the full faith and credit obligation, that inquiry remains open for consideration on remand. See *ante*, at 379, n. 5 (due process "w[as] not the basis for the decision below," so the Court "need not address [it]").

I

Matsushita's acquisition of MCA prompted litigation in state and federal courts. A brief account of that litigation

will facilitate comprehension of the Epstein plaintiffs' position. On September 26, 1990, in response to reports in the financial press that Matsushita was negotiating to buy MCA, a suit was filed in the Court of Chancery of Delaware, a purported class action on behalf of the stockholders of MCA. Naming MCA and its directors (but not Matsushita) as defendants, the complaint invoked state law only. It alleged that MCA's directors had failed to carry out a market check to maximize shareholder value upon a change in corporate control, a check required by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del.1986). For this alleged breach of fiduciary duty, the complaint sought, *inter alia*, an injunction against Matsushita's proposed acquisition of MCA.

Matsushita announced its tender offer on November 26, 1990. It offered holders of MCA common stock $71 per share, if they tendered their shares before December 29, 1990. The owners of 91% of MCA's common stock tendered their shares and, on January 3, 1991, for a price of $6.1 billion, Matsushita acquired MCA.

On December 3, 1990, a few days after the required Securities and Exchange Commission (SEC) filings disclosed the terms of the tender offer, several MCA shareholders filed suit in the United States District Court for the Central District of California.[1] Based solely on federal law, their complaints

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1. Two sets of plaintiffs filed complaints in the Central District of California: the Epstein plaintiffs (including Lawrence Epstein, John Linder, Jane Rockford, Maurice Karlin, Ruth Karlin, Beth Karlin, and Bert Karlin) sued both individually and on behalf of all

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alleged that Matsushita, first named defendant, violated SEC Rules 14d-10, 17 CFR § 240.14d-10 (1994), and 10b-13, *id.*, § 240.10b-13, by offering preferential treatment in the tender offer to MCA principals Lew Wasserman and Sidney Sheinberg. As stated in the complaint, the public tender offer included a special tax-driven stock swap arrangement for Wasserman, then MCA's chairman and chief executive officer, and a $21 million bonus for Sheinberg, then MCA's chief operating officer and owner of 1,170,000 shares of MCA common stock. These arrangements allegedly violated, *inter alia*, the SEC's "all-holder best-price" rule (Rule 14d-10), which requires bidders to treat all shareholders on equal terms. The claims of federal securities law violations fell within the exclusive jurisdiction of the federal court. See 15 U.S.C. § 78aa. The Epstein plaintiffs also sought class certification to represent all MCA shareholders at the time of the tender offer.

Two days later, counsel in the Delaware action advised MCA's counsel that the Delaware plaintiffs intended to amend their complaint to include additional claims against MCA and its directors and to add Matsushita as a defendant. The additional claims alleged that MCA wasted corporate

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MCA shareholders at the time of the tender offer; Walter Minton brought suit in his individual capacity. All had tendered their shares for the $71 tender price. The District Court consolidated the two cases. Minton and, it appears, Rockford opted out of the Delaware class-action settlement. Matsushita does not contest the qualification of Minton and Rockford, as individuals, to pursue federal claims unimpeded by the settlement in Delaware. See Brief for Petitioners ii. Matsushita does contest any class-action initiative in federal court.

assets by increasing the corporation's exposure to liability for violation of Rules 10b-13 and 14d-10, that MCA failed to make full disclosure of the benefits MCA insiders would receive from the takeover, and that directors Wasserman and Sheinberg breached their fiduciary duties by negotiating preferential deals with Matsushita. Matsushita, the amended complaint alleged, had conspired with and aided and abetted MCA directors in violation of Delaware law.

Within days, the Delaware parties agreed to a settlement and, on December 17, 1990, submitted their proposal to the Delaware Vice Chancellor. The agreement provided for a modification of a "poison pill" in the corporate charter of an MCA subsidiary,[2] and for a fees payment of $1 million to the class counsel. The settlement agreement required the release of all claims, state and federal, arising out of the tender offer.

The Vice Chancellor rejected the settlement agreement on April 22, 1991, for two reasons: the absence of any monetary benefit to the class members; and the potential value of the federal claims that the agreement proposed to release. The "generous payment" of $1 million in counsel fees, the Vice Chancellor observed, "confer[red] no benefit on the members of the Class." *In re MCA, Inc. Shareholders Litigation*, 598 A.2d 687, 695 (Del. Ch.1991). And the value of the revised poison pill to the class, the Vice Chancellor said, was "illusionary[,] . . . apparently . . . proposed merely

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2. The subsidiary in question was spun off from MCA during the merger because it owned a television station that federal law prohibited Matsushita from acquiring. The $71 tender offer price included $5 worth of stock in this new corporation.

to justify a settlement which offers no real monetary benefit to the Class." *Id.*, at 696. The Vice Chancellor described the state-law claims as "at best, extremely weak and, therefore, [of] little or no value." *Id.*, at 694. "[T]he only claims which have any substantial merit," he said, "are the claims . . . in the California federal suit that were not asserted in this Delaware action." *Id.*, at 696. After the rejection of the settlement, the Delaware lawsuit lay dormant for more than a year.

The federal litigation proceeded. In various rulings, the District Court denied the federal plaintiffs' motion for partial summary judgment, denied the Epstein plaintiffs' motion for class certification, and granted Matsushita's motion for summary judgment dismissing the claims. On April 15, 1992, the District Court entered its final judgment, which the Epstein plaintiffs appealed to the Ninth Circuit.

On October 22, 1992, after the federal plaintiffs had filed their notice of appeal, the Delaware parties reached a second settlement agreement. Matsushita agreed to create a $2 million settlement fund that would afford shareholders 2 to 3 cents per share before payment of fees and costs. The Delaware class counsel requested $691,000 in fees. In return for this relief, the Delaware plaintiffs agreed to release "all claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, and any rules or regulations promulgated thereunder, or otherwise) . . . in connection with or that arise now or hereafter out of the [tender offer] . . . including without limitation the claims asserted in the California Federal Actions. . . ." App. 187-188. Unlike the first settlement

proposal, the second agreement included an opt-out provision.

This time the Vice Chancellor approved the settlement. He stated: "[i]t is in the best interests of the class to settle this litigation and the terms of the settlement are fair and reasonable — although the value of the benefit to the class is meager." *In re MCA, Inc. Shareholders Litigation*, C.A. No. 11740, 1993 WL 43024, *1 (Del. Ch., Feb.16, 1993). He found the class members' recovery of 2 to 3 cents per share "adequate (if only barely so) to support the proposed settlement." *Id.*, at *4. The federal claims, he reasoned, having been dismissed by the District Court, "now have minimal economic value." *Ibid.* And he gave weight to the presence in the second settlement agreement of an opt-out provision. *Ibid.*

Addressing the objectors' contention that the proposed settlement was "collusive," the Vice Chancellor recalled that "the settling parties ha[d] previously proposed a patently inadequate settlement," and he agreed that "suspicions abound." *Id.*, at *5. Nevertheless, he noted, the "[o]bjectors have offered no evidence of any collusion," so he declined to reject the settlement on that ground. *Ibid.* Reducing the counsel fees from the requested $691,000 to $250,000, the Vice Chancellor offered this observation: "[T]he defendants' willingness to create the settlement fund seems likely to have been motivated as much by their concern as to their potential liability under the federal claims as by their concern for liability under the state law claims which this Court characterized as 'extremely weak.' " *Id.*, at *6. In a brief order, the Delaware Supreme Court affirmed "on the basis

of and for the reasons assigned by the Court of Chancery. . . ." *In re MCA, Inc. Shareholders Litigation*, C.A. No. 126,1993, 1993 WL 385041, *1 (Sept. 21, 1993), judgt. order reported at 633 A.2d 370.

Before the Ninth Circuit, Matsushita argued that the Delaware class-action settlement barred litigation of the federal claims raised in the Epstein action. The Ninth Circuit disagreed. Relying on federal circuit court decisions,[3] the Court of Appeals held that state courts lack plenary power to approve settlements that effectively extinguish exclusively federal claims. Only if federal and state claims rest on the "identical factual predicate," the Ninth Circuit concluded, could a state-court settlement subsume an exclusively federal claim. It was not enough, in the Ninth Circuit's view, that the discrete federal and state claims stem from the "same transaction," the test Matsushita urged. 50 F.3d, at 661-665. The federal securities claims did not turn on the same operative facts as the state claims pleaded in Delaware, the Ninth Circuit found; accordingly, the federal claims could not have been extinguished by the issue-preclusive effect of an adjudication of the state claims. This analysis led the Ninth Circuit to declare that the Delaware decree "exceed[ed] the jurisdiction of the state court and, therefore, is not entitled to full faith and credit." *Id.*, at 666.

On the merits, the Ninth Circuit held, first, that a private right of action could be maintained to redress Rule 14d-10

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3. Closest in point, the court said, were *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (CA3 1994), and *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (CA1 1991). See *Epstein v. MCA, Inc.*, 50 F.3d 644, 662 (CA9 1995).

violations. *Id.*, at 652. The court next held that Matsushita violated Rule 14d-10 by paying Wasserman consideration not offered to other shareholders, *id.*, at 657; reversing the District Court's disposition of this matter, the Ninth Circuit held that plaintiffs were entitled to summary judgment on liability and remanded for a determination of damages, *ibid.* Regarding plaintiffs' claim that the $21 million payment to Sheinberg violated Rule 14d-10, the Ninth Circuit vacated the summary judgment for Matsushita and remanded for a determination whether the payment was in fact made to encourage Sheinberg to tender his shares. *Id.*, at 659.

II

A

Section 1738's full faith and credit instruction, as the Court indicates, requires the forum asked to recognize a judgment first to determine the preclusive effect the judgment would have in the rendering court. See *Kremer*, 456 U.S., at 466; *Marrese*, 470 U.S., at 381. Because the Ninth Circuit did not evaluate the preclusive effect of the Delaware judgment through the lens of that State's preclusion law, I would remand for that determination. See *id.*, at 386-387; *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 87 (1984) ("Prudence . . . dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it.").[4]

4. In its endeavor to forecast Delaware preclusion law, the Court appears to have blended the "identical factual predicate" test applied by the Delaware Supreme Court in *Nottingham Partners v. Dana*, 564 A.2d 1089, 1106-1107 (1989), with the broader "same transaction" test advanced by Matsushita. See *ante*, at 879-880.

B

Every State's law on the preclusiveness of judgments is pervasively affected by the supreme law of the land. To be valid in the rendition forum, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause. *Kremer*, 456 U.S., at 482-483. "A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment." *Id.*, at 482 (footnote omitted).

In *Phillips Petroleum Co. v. Shutts*, this Court listed minimal procedural due process requirements a class-action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation. 472 U.S., at 812. "[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Ibid.* (citing *Hansberry v. Lee*, 311 U.S. 32, 42-43, 45 (1940)). As the Court's phrase "at all times" indicates, the class representative's duty to represent absent class members adequately is a continuing one. 472 U.S., at 812; see also *Gonzales v. Cassidy*, 474 F.2d 67, 75 (CA5 1973) (representative's failure to pursue an appeal rendered initially adequate class representation inadequate, so that judgment did not bind the class).

Although emphasizing the constitutional significance of the adequate representation requirement, this Court has

recognized the first line responsibility of the States themselves for assuring that the constitutional essentials are met. See *Hansberry*, 311 U.S., at 42.[5] Final judgments, however, remain vulnerable to collateral attack for failure to satisfy the adequate representation requirement. See *id.*, at 40, 42; see also Restatement (Second) of Judgments §§ 42(d) and (e), Comments *e* and *f*, pp. 406, 410-412 (1982) (noting, *inter alia*, that judgment is not binding on purportedly represented person where, to the knowledge of the opposing party, the representative seeks to advance his own interest at the expense of the represented person); see also *id.*, § 41, Comment *a*, p. 394 (if § 42 circumstances exist, "the represented person may avoid being bound *either* by appearing in the action before rendition of the judgment *or* by attacking the judgment by subsequent proceedings"). (Emphasis added.) A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action. See 7B C.

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5. Many States, including Delaware, have class-action rules corresponding to Federal Rule of Civil Procedure 23, a rule ranking adequacy of representation as a prerequisite to maintaining a class action. See 3 H. Newberg & A. Conte, Newberg on Class Actions, App. 13-1 (3d ed.1992) (listing 39 States and the District of Columbia with rules comparable to the amended Federal Rule of Civil Procedure 23); Fed. Rule Civ. Proc. 23(a)(4) (representatives may sue on behalf of the class only if "the representative parties will fairly and adequately protect the interests of the class"); see also *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158, n. 13 (1982) (Federal Rule of Civil Procedure 23(a)(4)'s adequate representation requirement "raises concerns about the competency of class counsel and conflicts of interest," in addition to the question whether the representative shares the interests of the class members).

Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1789, p. 245 (2d ed.1986).

In Delaware, the constitutional due process requirement of adequate representation is embodied in Delaware Court of Chancery's Rule 23, a class-action rule modeled on its federal counterpart. *Prezant*, 636 A.2d, at 923, 920. Delaware requires, as a prerequisite to class certification, that the named plaintiffs "fairly and adequately protect the interests of the class." Del. Ch. Rule 23(a)(4). In *Prezant*, the Delaware Supreme Court considered whether adequate class representation was "a *sine qua non* for approval of a class action settlement," and concluded that it was. *Prezant*, 636 A.2d, at 920, 926. The state high court overturned a judgment and remanded a settlement because the Court of Chancery had failed to make an explicit finding of adequate representation. *Id.*, at 926.

The Delaware Supreme Court underscored that due process demands more than notice and an opportunity to opt-out; adequate representation, too, that court emphasized, is an essential ingredient. *Id.*, at 924 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S., at 812, 105 S.Ct., at 2974). Notice, the Delaware Supreme Court reasoned, cannot substitute for the thorough examination and informed negotiation an adequate representative would pursue *Prezant*, 636 A.2d, at 924. The court also recognized that opt-out rights "are infrequently utilized and usually economically impracticable." *Ibid.*

The Vice Chancellor's evaluation of the merits of the settlement could not bridge the gap, the Delaware Supreme

Court said, because an inadequate representative "taint[s]" the entire settlement process. *Id.*, at 925.[6] "[A]n adequate representative," the Delaware Supreme Court explained, "vigorously prosecuting an action without conflict and bargaining at arms-length, may present different facts and a different settlement proposal to the court than would an inadequate representative." *Ibid.* Consequently, the Delaware Supreme Court held, "*in every class action settlement*, the Court of Chancery is required to make an explicit determination on the record of the propriety of the class action according to the requisites of Rule 23(a) and (b)." *Ibid.*

In the instant case, the Epstein plaintiffs challenge the preclusive effect of the Delaware settlement, arguing that the Vice Chancellor never in fact made the constitutionally required determination of adequate representation. See *id.*, at 923.[7] They contend that the state court left unresolved

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6. In both *Prezant* and the instant case, a temporary settlement class device was used, telescoping the inquiry of adequate representation into the examination of the fairness of the settlement. According to the Delaware Supreme Court, however, this near simultaneity does *not* relieve the representative of her duty to demonstrate, nor the court of its duty to determine, the adequacy of representation. *Prezant*, 636 A.2d, at 923. In a comprehensive opinion, the Third Circuit reached the same conclusion after examining the temporary class settlement device in the context of Federal Rule of Civil Procedure 23. See *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 794-800 (1995).

7. The Vice Chancellor did not have the benefit of the Delaware Supreme Court's clear statement in *Prezant*, decided one year after

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key questions: notably, did the class representatives share substantial common interests with the absent class members, and did counsel in Delaware vigorously press the interests of the class in negotiating the settlement.[8] In particular, the Epstein plaintiffs question whether the Delaware class representatives — who filed the state lawsuit on September 26, 1990, two months before the November 26 tender offer announcement — actually tendered shares in December, thereby enabling them to litigate a Rule 14d-10 claim in federal court. They also suggest that the Delaware representatives undervalued the federal claims — claims they could only settle, but never litigate, in a Delaware court. Finally, the Epstein plaintiffs contend that the Vice Chancellor improperly shifted the burden of proof;[9] he

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this settlement was approved. In *Prezant*, however, the Delaware Supreme Court largely reiterated and applied what this Court had stated almost a decade earlier in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812 (1985). See also 2 R. Balotti & J. Finkelstein, Delaware Law of Corporations and Business Organization § 13.22, p. 13-131, and n. 578 (2d ed. 1996 Supp.).

8. The order approving the class for settlement purposes, the Epstein plaintiffs urge, contains no discussion of the adequacy of the representatives, see App. 198, and the order and final judgment approving the settlement contains only boilerplate language referring to the adequacy of representation, see *id.*, at 204-205. The Delaware Supreme Court approved the Court of Chancery's judgment in a one paragraph order. See *In re MCA, Inc. Shareholders Litigation*, 633 A.2d 370 (1993) (judgt. order).

9. Delaware law appears to place the burden of proof on the class representatives. See 2 Balotti & Finkelstein, *supra*, at 11, n. 7,
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rejected the Delaware objectors' charges of "collusion" for want of evidence while acknowledging that "suspicions [of collusion] abound." *In re MCA, Inc. Shareholders Litigation*, 1993 WL 43024, at *5.[10]

Mindful that this is a court of final review and not first view, I do not address the merits of the Epstein plaintiffs' contentions, or Matsushita's counterargument that the issue of adequate representation was resolved by full and fair litigation in the Delaware Court of Chancery.[11] These

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§ 13-17, p. 13- 121 (class representative must prove satisfaction of Del. Ch. Rule 23(a) requirements, including adequacy of representation); see also 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1765, pp. 273-274, and n. 29 (2d ed.1986); 3B J. Moore, Moore's Federal Practice § 23.02-2 (2d ed.1995).

10. In this regard, it is noteworthy that Matsushita did not move to dismiss the Delaware action after the Vice Chancellor, in rejecting the first proposed settlement, surveyed the state-law claims and found them insubstantial. See *In re MCA, Inc. Shareholders Litigation*, 598 A.2d 687, 694 (Del. Ch. 1991) (Vice Chancellor described "the asserted state law claims" as "at best, extremely weak" and of "little or no value").

11. Counsel for Matsushita acknowledged that relief from a judgment may be sought in Delaware pursuant to that State's counterpart to Federal Rule of Civil Procedure 60(b). See Tr. of Oral Arg. 51-52; Del. Ch. Rule 60; see also 2 Newberg & Conte, *supra*, at 9, n. 5, §§ 11.27, 11.63 (Federal Rule of Civil Procedure 60(b) provides an avenue to challenge the adequacy of representation in a class settlement).

arguments remain open for airing on remand. I stress, however, the centrality of the procedural due process protection of adequate representation in class-action lawsuits, emphatically including those resolved by settlement. See generally J. Coffee, Suspect Settlements in Securities Litigation, N.Y.L.J., March 28, 1991, p. 5, col. 1.

## APPENDIX B — ORDER AND FINAL JUDGMENT OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY DATED FEBRUARY 22, 1993 AND FILED FEBRUARY 23, 1993

IN THE COURT OF CHANCERY OF THE
STATE OF DELAWARE IN AND FOR
NEW CASTLE COUNTY

CONSOLIDATED
C.A. NO. 11740

IN RE MCA INC.
SHAREHOLDERS LITIGATION

ORDER AND FINAL JUDGMENT

On this 22 day of February, 1993, a hearing having been held before this Court to determine whether the terms of the Stipulation of Settlement dated October 22, 1992 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto, are fair, reasonable and adequate for the settlement of all claims asserted herein; and whether judgment should be entered in these civil actions (the "Actions") dismissing the Actions on the merits with prejudice as against all of the plaintiffs and all members of the Settlement Class certified in this Court's Order dated October 27, 1992; and the Court having considered all matters submitted to it at the hearing and otherwise and the Court having rendered its Memorandum Opinion dated February 12, 1993 approving the Settlement and awarding attorneys' fees and expenses:

*Appendix B*

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Notice and Summary Notice (as defined in ¶ 4(b) of the Stipulation), is hereby determined to have been the best practicable notice under the circumstances and in full compliance with Rule 23 of the Court of Chancery and the requirements of due process and it is hereby further determined that the plaintiffs in the Actions, as representatives of the Settlement Class, have fairly and adequately protected the interests of the Settlement Class and that the maintenance of this action as a class action meets all the requirements of Rule 23(a) and (b)(3) of the Court of Chancery.

2. The Stipulation and the Settlement are approved as fair, reasonable and adequate and in the best interests of the plaintiffs and the Settlement Class, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation, provided that any additional Requests for Exclusion received after the deadline set in paragraph 6 of the Hearing Order dated October 27, 1992 but prior to February 12, 1993 will be effective.

3. (a) The Actions are hereby dismissed with prejudice on the merits as to all defendants in the Actions (regardless of whether any such defendant has been served or entered an appearance in any of the Actions) and their respective present and former officers, directors, employees, agents, attorneys, financial advisors, commercial bank lenders, investment bankers, representatives, trustees, affiliates,

associates, parents, subsidiaries, general and limited partners and partnerships, heirs, executors, administrators, successors and assigns (including Lazard Freres & Co. (financial advisor to MCA), Allen & Co. Inc. (financial advisor to Matsushita) and Creative Artists Agency Inc. (advisor to Matsushita)) (collectively, the "Released Persons"), as against plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom) and their successors and assigns, whether known or unknown, whether directly or in any other capacity, without costs except as provided in the Stipulation, such dismissal to be subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation.

(b) All claims, rights and causes of action (state or federal, including but not limited to claims arising under the federal securities laws, any rules or regulations promulgated thereunder, or otherwise), whether known or unknown that are, could have been or might in the future be asserted by any of the plaintiffs or any member of the Settlement Class (other than those who have validly requested exclusion therefrom), whether directly, derivatively, representatively or in any other capacity, against any of the Released Persons or against anyone else in connection with or that arise now or hereafter out of the Merger Agreement, the Tender Offer, the Distribution Agreement, the Capital Contribution Agreement, the employee compensation arrangements, the Tender Agreements, the Initial Proposed Settlement, this Settlement (except for compliance with the Settlement), or any matters, transactions or occurrences

referred to in the December 4, 1990 Claim Letter and the Amended Complaint in the Action, or the fiduciary or disclosure obligations of any of the Released Persons with respect to any of the foregoing, and including without limitation the claims asserted in the California Federal Actions, the Second Minton Action and the Second Epstein Action (all as defined in the Stipulation) (all of which are hereinafter collectively referred to as the "Settled Claims") are hereby compromised, settled, released and discharged with prejudice by virtue of the proceedings herein and this Order and Final Judgment.

4. The plaintiffs and all members of the Settlement Class (other than those who have validly requested exclusion therefrom), their successors and assigns, whether acting directly, derivatively, representatively or in any other capacity, are hereby permanently barred and enjoined from instituting or prosecuting any other action in any court of this or any other jurisdiction based upon, relating to, or for the purpose of enforcing any of the Settled Claims.

5. Plaintiffs' attorneys of record herein are hereby awarded the sum of $250,000 in fees and reimbursement of expenses in connection with the Actions, which sum the Court finds to be fair and reasonable and which shall be paid to plaintiffs' attorneys according to the terms set forth in the Stipulation. Said sum shall accrue interest and be paid in accordance with paragraph 8 of the Stipulation.

s/ [illegible]
Vice Chancellor

## APPENDIX C — EXCERPTS FROM TRANSCRIPT OF ARGUMENT ON PLAINTIFFS' APPLICATION FOR APPROVAL OF A SETTLEMENT AND ATTORNEYS' FEES OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY DATED JANUARY 21, 1993

IN THE COURT OF CHANCERY OF THE
STATE OF DELAWARE IN AND FOR
NEW CASTLE COUNTY

C.A. No. 11740

IN RE MCA INC.
SHAREHOLDERS LITIGATION

Courtroom No. 106
Public Building
Wilmington, Delaware
Thursday, Jan. 21, 1993
12:04 p.m.

BEFORE: HON. MAURICE A. HARTNETT, III,
Vice Chancellor.

ARGUMENT ON PLAINTIFFS' APPLICATION
FOR APPROVAL OF A SETTLEMENT
AND ATTORNEYS' FEES

* * *

[49] MR. ALLYN: May it please the Court: My name is James Allyn. I represent the objector, William Krupman.

*Appendix C*

Vice Chancellor, this settlement is not fair and it should not be approved. In explaining why, I will first describe how Mr. Krupman and I came to be here today, since you have heard allegations that he and I are pawns or straw men of the Kaufman Malchman firm.

I am a solo general practitioner in New York City. It is an honor for me to be here in this courtroom with these distinguished lawyers today. I am not an expert in securities litigation. Does that buttress their claim that he and I are pawns of Kaufman Malchman? No. In fact, it rebuts that claim, as I will explain.

Mr. Krupman is my father-in-law. We have an excellent relationship. That also means that my expected reimbursement for fees and expenses in this matter is about $691,000 less than what the plaintiffs' attorneys seek.

How did Mr. Krupman come to be an objector here? In November he asked me to review a proposed settlement that was submitted to him. [50] At the end of November at a family dinner he asked me what I thought about it. I did some calculations and came up with the number that he was being offered $2 a share. Fortunately, another relative who is an accountant was there, and he came up with the correct figure of two cents a share. I told him that the attorneys were going to submit an application to get $600,000 in fees.

Mr. Krupman was extremely upset. He believes that MCA was worth more than it was sold for. The deal happened at the price due to an extremely generous compensation package which was received by the directors. He felt the tender offer was inadequate and now he was being presented

with a settlement that was inadequate. He asked me to find out how to register his displeasure.

A few days later he gave me the name of a gentleman named Ernest Kaufman in Los Angeles, and asked me to call him for information. I called Mr. Kaufman at the beginning of December. I left a message that I wanted to talk about the MCA case. He never called me back.

Being busy with other matters such as making a living, I did not call Mr. Kaufman again, [51] which is a demonstration of inertia that occurs even among those who wish to object to a settlement.

In mid-December a friend called me up. He asked me to initiate a class action against National Health Laboratories, whose stock had plummeted after they pled guilty to defrauding the government. I explained to my friend that I was not qualified to handle such litigation, given the size of my practice and the level of my experience. I requested that that person send me a copy of the complaint in the matter.

Returning to my office after Christmas, on my desk was a letter from Mr. Jeffrey Squire of the Kaufman Malchman firm. It turned out that his firm had handled the National Health Laboratories matter. He enclosed a copy of the complaint, along with a cover letter stating that I should feel free to call him if I had any questions about the complaint or if I wanted to discuss securities litigation in general.

I called and left a message for him to thank him for sending me the materials. I also noticed that he was from the Kaufman Malchman firm, the same firm as Ernest Kaufman in Los Angeles.

[52] Mr. Squire was on vacation. However, I left a message. He returned my call nonetheless. I thanked him. I then asked him if he knew anything about MCA. I told him that Mr. Krupman was very displeased and if there was anything he could do, I asked him for ideas and advice on how to contest the settlement. We discussed the case, and Mr. Squire offered to provide materials to use in drawing up an objection. He sent me the Exhibits B through K, which are mainly the federal appeals briefs, which are attached to Mr. Krupman's affidavit, plus a draft objection.

I reviewed these and then called Peter Linden at the Kaufman firm to further discuss them. I edited the draft, typed it into my computer. I then discarded the draft that Kaufman Malchman had provided to me. I printed my own draft, and went through this process a number of times, revising my drafts each time. I do not have a copy of what Kaufman Malchman gave me. I have since stated that in a document request which was made to Mr. Krupman. I asked Kaufman Malchman to provide me with a copy, but they are unable to do so.

I then showed the draft affidavit to [53] Mr. Krupman. I discussed the case with him. He revised the affidavit. I made those changes, and we submitted the affidavit.

The settlement proponents now say that we are a pawn of Kaufman Malchman. That is very ironic to me. We serendipitously came into contact with them after Mr. Kaufman in Los Angeles did not return my initial phone call.

* * * *

## APPENDIX D — AMENDED STOCKHOLDERS' CLASS ACTION COMPLAINT DATED AND FILED DECEMBER 14, 1990

## IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

## CONSOLIDATED CIVIL ACTION NO. 11740

## IN RE:

## MCA INC. SHAREHOLDERS LITIGATION

## AMENDED STOCKHOLDERS' CLASS ACTION COMPLAINT

Plaintiffs allege upon information and belief, except for paragraph 5 which is alleged upon knowledge, as follows:

### NATURE OF THE ACTION

1. This is a stockholders' class action on behalf of the public stockholders of MCA Inc. ("MCA" or the "Company") who are being deprived of the opportunity to maximize the value of their MCA common stock in the sale of the Company. This Amended Stockholders' Class Action Complaint (the "Amended Complaint") is being filed pursuant to the Stipulation and Order governing scheduling in this action. The Amended Complaint incorporates plaintiffs' allegations against defendants as set forth in a letter dated December 4, 1990, from Steven Schulman, Esquire, to Herbert M. Wachtell, Esquire.

2. As more fully described herein, on November 26, 1990, defendants Lew R. Wasserman ("Wasserman") and Sidney Jay Sheinberg ("Sheinberg"), together with other members of MCA senior management and their advisors, entered into a merger agreement which provides for the sale of MCA to Matsushita Electric Industrial Co. ("Matsushita"), a Japanese corporation and one of the world's largest consumer electronic manufacturers (the "Merger"). As part of the Merger, Matsushita commenced a tender offer to MCA's stockholders on November 30, 1990, for all of MCA's common stock at a price of $66 per share plus a purportedly pro rata distribution of the stock of one of MCA's businesses, WWOR-TV (the "Tender Offer"). The Tender Offer expires by its terms on December 29, 1990.

3. The decision by defendants to sell the Company imposes upon them fundamental fiduciary duties to disclose all material facts to the Company's stockholders with complete candor and to seek the best possible transaction for the stockholders through implementation of bidding mechanisms or the exploration of strategic alternatives designed to assure the maximization of stockholder value. MCA's board of directors (named as defendants in this action) have been and are breaching their fiduciary duties to the stockholders of MCA by, inter alia, (1) failing adequately to disclose to MCA's stockholders material facts necessary to make an informed decision about the Tender Offer and Merger, including substantial conflicts of interest involving defendants Wasserman and other MCA senior management and MCA's Board of Directors, the future status of WWOR-TV, prior market contacts from other potential purchasers of MCA, and other material information, (2) giving

preferential treatment to defendant Wasserman by paying him preferred stock rather than the consideration paid to the public stockholders, and (3) negotiating and entering the Merger agreement on a preferential basis with Matsushita and failing to implement the auction or other bidding mechanisms or market check procedures necessary to assure that the stockholders receive the highest possible price in connection with the change in control.

4. The Merger is designed by the Individual Defendants and other members of MCA senior management to entrench the officers and directors of MCA in the management and control of MCA and to advance their own personal interests at the expense of MCA's public stockholders. Indeed, the Merger represents the culmination of a series of steps which the Individual Defendants have taken to deter and ultimately thwart any unsolicited expression of interest to acquire the Company which they have not initiated or approved. In furtherance of these efforts, the Individual Defendants over the last several years have adopted and utilized an array of defensive weapons, including (a) a "poison pill" created for the purpose of discouraging unsolicited takeover attempts and usurping from MCA's stockholders the power to accept or reject any proposal for the purchase of their shares; (b) lucrative severance agreements (or "golden parachutes") to several executive officers of the Company; and (c) a "staggered" board intended to deter any unsolicited acquisition efforts.

5. The Individual Defendants and other members of MCA senior management with whom they are allied are attempting to transfer the entire ownership and control of

the Company's outstanding shares at a price substantially below their fair and intrinsic value, in order to gain valuable personal benefits from Matsushita in the Merger. As shown herein, the Merger and Tender Offer are timed to take advantage of a recent serious decline in the market value of MCA's common stock resulting from a temporary and reversible decline in revenues and net income caused inter alia, by the Company's expansion plan and a temporary market decline due to world events, including the Persian Gulf crisis. The long-term benefits which will result from this plan vastly exceed the immediate costs and burdens involved in developing these business opportunities and demonstrate that Matsushita in conjunction with the Individual Defendants is attempting to appropriate for itself the future growth and profitability of this entertainment giant without providing adequate disclosure of material information and obtaining fair and adequate consideration for the MCA public stockholders.

6. Preliminary and permanent injunctive relief and other equitable remedies are necessary to protect MCA public stockholders from the immediately threatened divestiture of their equity interest in MCA under circumstances representing a gross deviation from the enhanced fiduciary responsibilities which Delaware law imposes in connection with the sale of a company or any other fundamental change in corporate control.

## THE PARTIES

7. Plaintiffs are owners of shares of common stock of MCA who have been damaged and are threatened with

further injury by the wrongful actions of the defendants as set forth below. They bring this action as a class action on behalf of the public stockholders of MCA.

8. Defendant MCA is a Delaware corporation that maintains its principal executive offices in Universal City, California. MCA is an international concern engaged in the production and distribution of theatrical, non-theatrical, television and home video products; licensing of merchandising rights and film property publishing rights; manufacture and distribution of recorded music and music publishing; operation of amphitheaters; manufacturing and licensing of entertainment/sports apparel, non-consumable concessions for sports/entertainment events and other music entertainment activities; retailing and mail order of gift merchandise; book publishing; television broadcasting; recreation services; and real estate development.

9. At all relevant times herein, each of the following defendants (collectively, the "Individual Defendants") were directors of MCA and/or senior officers of MCA.

a. Lew R. Wasserman is Chairman of the Board, Chief Executive Officer and a member of the Executive Committee. Wasserman's current annual salary is approximately $900,000. Wasserman also owned as of January 31, 1990 over 4.9 million shares of MCA common stock representing approximately 6.7% of the common shares outstanding. In connection with the Merger, Wasserman will receive an enhanced salary of at least $3 million annually, as well as preferred stock in Holding that will pay him a cash dividend exceeding $28 million annually.

b. Sidney Jay Sheinberg ("Sheinberg") is a Director, President and Chief Operating Officer and a member of the Executive Committee. Sheinberg's current annual salary is approximately $900,000. Sheinberg also owned as of January 31, 1990, approximately 1.3 million shares of MCA common stock, representing approximately 1.8% of the common shares outstanding. In connection with the Merger, Sheinberg will receive an enhanced salary of over $8 million annually, plus a cash bonus of $21 million.

c. Thomas P. Pollock ("Pollock") is a Director and Executive Vice President. Pollock's current annual salary is $850,000. Pollock also owned as of January 31, 1990, 144,240 shares of MCA common stock, representing approximately .02% of the amount of common shares outstanding. As part of the Merger, Pollock will receive $16.7 million in bonuses and incentives.

d. Thomas Wertheimer ("Wertheimer") is a Director, Executive Vice President and a member of the Executive Committee. Wertheimer's current annual salary is $650,000. Wertheimer also owned as of January 31, 1990, 227,235 shares of MCA common stock, representing approximately .03% of the amount of common shares outstanding. In connection with the Merger, Wertheimer will receive $7.7 million in bonuses and incentives.

e. Charles S. Paul ("Paul") is a Director and President of MCA Enterprises, a subsidiary of MCA. In

connection with the Merger, Paul will receive $12.3 million in bonuses and incentives.

f. Howard H. Baker ("Baker"), a Director, is a Partner in the law firm of Baker, Worthington, Crossley, Stansberry & Woolf. Baker's firm will receive substantial compensation from MCA for services purportedly rendered in the Tender Offer and Merger.

g. Robert S. Strauss, a Director, is a Partner in the law firm of Akin, Gump, Strauss, Hauer & Feld. Strauss' firm represented both MCA and Matsushita in connection with the Tender Offer and Merger. His firm will receive $8 million from MCA for its services purportedly rendered in connection with the challenged transaction, and an undisclosed sum for its representation of Matsushita.

h. Felix G. Rohatyn, a Director, is a General Partner of Lazard Freres & Co. ("Lazard") which served as the principal financial advisor to MCA, and delivered a "fairness opinion" in connection with the Tender Offer and Merger, for which Lazard will receive over $16.8 million in the event that a sale of the Company is accomplished.

i. Defendants Thomas V. Jones, Howard P. Allen, and Mary Gardiner Jones are each members of MCA's Board of Directors. These directors receive annual directors' compensation of $18,000, plus $18,000 per year for each committee on which they serve, and $1,500 for each directors' and committee meeting they attend.

10. Defendant Matsushita, a company organized under the laws of Japan, is one of the world's largest producers of consumer electronic and electric products with sales in fiscal 1990 of more than $37 billion. Matsushita operates 117 companies in 39 countries. Matsushita's principal executive offices are located in Osaka, Japan. Defendant Matsushita Acquisition Corp. ("Acquisition"), a Delaware corporation and a wholly-owned subsidiary of defendant Matsushita Holding Corp. ("Holding"), also a Delaware corporation, has been incorporated for the purpose of purchasing all the common stock of MCA. Under Section 6.17 of the Merger Agreement, defendants Matsushita, Acquisition and Holding submit to the personal jurisdiction of this Court.

11. All officers and directors of MCA, as a group, including the Individual Defendants, beneficially owned over 7 million shares of MCA common stock, or nearly 10% of MCA's common stock outstanding as of January 31, 1990.

12. By virtue of their positions as directors and/or officers of MCA and their exercise of control over the business and corporate affairs of MCA, the Individual Defendants have and at all relevant times had the power to control and influence, and did control and influence and cause MCA to engage in the practices complained of herein. Each Individual Defendant owed and owes MCA and its stockholders fiduciary obligations and were and are required to: fulfil their duty of candor to the stockholders by making timely and adequate disclosures in press releases and in the materials filed with the Securities Exchange Commission ("S.E.C.") in connection with the Tender Offer and Merger, including Schedules 14D-1 and 14D-9; use their ability to

control and manage MCA in a fair, just and equitable manner; act in furtherance of the best interests of MCA and its stockholders; act to maximize stockholder value; govern MCA in such a manner as to heed the expressed views of its public shareholders; refrain from abusing their positions of control; and not to favor their own interests at the expense of MCA and its stockholders. MCA has distributed the Offer to Purchase to its stockholders together with the Schedule 14D-9 and Matsushita has the right to "review and comment" upon disclosure materials of MCA in connection with the Tender Offer and Merger. Therefore, all defendants are jointly responsible for the inadequate disclosures provided to MCA stockholders in connection with the challenged transactions.

13. By virtue of the acts and conduct alleged herein, the Individual Defendants, who control the actions of the Company, are breaching their fiduciary duties to the public stockholders of MCA.

14. The Individual Defendants are sued individually as conspirators and aiders and abettors, as well as in their capacity as officers and/or directors of the Company, and the liability of each arises from the fact that they have engaged in all or part of the unlawful acts, plans, schemes or transactions complained of herein.

15. Matsushita, Acquisition and Holding are acting in concert with the Individual Defendants and are sued as conspirators and aiders and abettors of the Individual Defendants.

*Appendix D*

## CLASS ACTION ALLEGATIONS

16. Plaintiffs bring this action pursuant to Rule 23 of the Rules of the Court of Chancery on behalf of themselves and all other stockholders of MCA, or their successors in interest (the "Class"). Excluded from the Class are the defendants, members of the immediate families of the Individual Defendants or their representatives, and directors, officers, subsidiaries, controlled affiliates, and partners of any of the defendants.

17. The action is properly maintainable as a class action for the following reasons:

a. The Class is so numerous that joinder of all members is impracticable. As of January 31, 1990, MCA had in excess of 73,000,000 shares of common stock outstanding held by thousands of stockholders of record and beneficial owners;

b. The members of the Class are scattered throughout the United States and are so numerous as to make it impractical to bring all of them before this Court;

c. There are questions of law and fact which are common to the Class and which predominate over questions affecting only individual Class members. The common questions include, inter alia, the following:

i) whether the Individual Defendants have breached their fiduciary obligations to plaintiffs and the other members of the Class by failing and

refusing to attempt in good faith to maximize stockholder value in the sale of the Company;

ii) whether the Individual Defendants have breached the fiduciary and other common law duties including the duty of complete candor owed by them to plaintiffs and the other members of the Class; and

iii) whether defendants have subjected MCA to potential liability under S.E.C. Rules 14d-7, 14d-10, 10b-13 and 13e-3, promulgated under the Securities and Exchange Act of 1934 (the "Exchange Act"), thereby causing MCA to expend and waste corporate assets that could have been distributed for the benefit of MCA's public stockholders; and

iv) whether plaintiffs and the other members of the Class are being or will continue to be injured by the wrongful conduct alleged herein and, if so, what is the proper remedy and/or measure of damages.

18. Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature. The claims of plaintiffs are typical of the claims of other members of the Class and plaintiffs have the same interests as the other Class members.

19. A class action is superior to other available methods for the fair and efficient adjudication of this action, and no unusual difficulties are likely to be encountered in the

management of this class action. The likelihood of individual Class members prosecuting separate claims is remote.

20. Defendants have acted and are about to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the Class as a whole.

## BACKGROUND

21. MCA is a recognized leader in the entertainment industry operating in six major business segments: film entertainment (51% of 1989 revenues of $3.4 billion); music entertainment (23%); retail and mail order (8%); book publishing (6%); broadcasting and cable (5%); and other operations (7%). MCA has had outstanding financial results in recent years as evidenced by the growth in sales and earnings as summarized below:

MCA Five Year Summary
(all figures in thousands except growth rate and EPS)

| Year | Sales | Net Income | EPS(S) |
|---|---|---|---|
| 1989 | 3,382,344 | 191,773 | 2.62 |
| 1988 | 2,900,339 | 164,916 | 2.26 |
| 1987 | 2,479,105 | 137,254 | 1.82 |
| 1986 | 2,230,018 | 150,904 | 1.97 |
| 1985 | 2,021,078 | 149,959 | 2.02 |
| 5-Year Growth Rate (%) | 13.70 | 6.30 | 6.70 |

*Appendix D*

22. In June 1989, the Company opened its new Universal Florida theme park which will operate in direct competition with the Disney World facility in Orlando, Florida. MCA also scored a recent coup when it paid the equivalent of $550 million in preferred stock for Geffen Records, a leading member of the recording industry. It also owns WWOR-TV, an independent New York area television station, and has a 50% stake in the cable USA Network.

23. On July 19, 1990, defendant Wasserman announced that for both the three and six months ended June 30, 1990, the Company reported record second quarter and first half revenues and higher net income than the comparable periods of 1989. Revenues for the second quarter of 1990 were $949,942,000 compared to $828,256,000 for 1989. Net income was $44,781,000 or $0.54 per share compared to $41,972,000 or $0.58 per share for 1989. The weighted average number of common and common equivalent shares used in the determination of earnings per share for the three months ended June 30, 1990 and 1989 was 83,245,493 and 73,142,872, respectively. The 1990 calculations of earnings per share include the equivalent common shares for the Company's Series B convertible preferred shares issued during the second quarter of 1990 in connection with the Geffen acquisition.

24. Similarly, revenues for the first half of 1990 were $1,862,888 compared to $1,531,602 for 1989. Net income was $76,359,000 or $0.96 per share compared to $69,313,000 or $0.95 per share for 1989.

*Appendix D*

25. MCA's film entertainment group reported record revenues and operating incomes in the second quarter of 1990. The music entertainment group also reported record revenues and operating income for the second quarter of 1990. Broadcasting and cable reported record revenues and operating incomes in the second quarter of 1990 due to improved results for WWOR-TV and the USA Network. Retail and mail order had higher revenues in 1990 due to higher retail store sales.

26. The fiscal 1989 financial statements show that MCA's financial condition is also strong. The current ratio (current assets: current liabilities) was above 2X as it had been during the two years previous while the Company's debt/equity ratio decreased from 0.79 to an even more conservative 0.65.

27. Recognizing the strength of MCA's assets and the quality of its operations, industry financial analysts have conservatively valued MCA at up to $100 per share. However, MCA, like other media and entertainment companies, has recently suffered a serious decline on Wall Street. Since July, 1990, the market value of the stock has declined from a high of approximately $64 per share to as low as $34 per share immediately prior to the announcement of a prospective transaction with Matsushita. The decline in the value of the stock was accelerated by reports concerning problems incident to the opening of the vast new theme park in Orlando, Florida, the perceived dilution caused by the issuance of substantial additional shares to the Geffen interests in connection with the Geffen acquisition, and the overall market decline attributed to the Persian Gulf crisis.

These factors are temporary and reversible and do not detract from the impressive long-term strengths of the Company.

28. On September 25, 1990, the Wall Street Journal reported that Matsushita was negotiating with MCA over an acquisition transaction involving the entertainment giant. Both MCA and Matsushita thereafter publicly confirmed that representatives of the respective companies were involved in negotiations regarding a prospective change in control transaction. According to published reports, the widespread perception among major stock traders and financial analysts was that an announcement of a sale transaction was imminent. Reflecting these expectations, the market price of MCA common stock surged dramatically upward immediately upon announcement of these events from $34 1/2 per share to close at $54 per share on September 25, 1990, a net increase of 57%.

29. On September 26, 1990, plaintiffs filed their original Shareholders' Class Action Complaint (the "Original Complaint"). The Original Complaint sought injunctive and declaratory relief, as well as money damages, against an improper transaction between MCA and Matsushita.

30. On November 26, 1990, MCA entered into an Agreement of Merger with Matsushita. Under the Merger Agreement, Acquisition on November 30, 1990 commenced the Tender Offer to purchase all of MCA's common stock at a price of $66.00 per share in cash. On the same day, defendants filed Schedules 14D-1 and 14D-9 with the S.E.C. and distributed to MCA's stockholders the Offer to Purchase. The Tender Offer expires on December 29, 1990. The Merger

Agreement also calls for MCA to spin off to its stockholders, on a purportedly pro rata basis, its interest in the television station WWOR-TV.

31. In addition, the principals to the transaction have negotiated and entered into a series of other transactions and agreements, including the following:

a) The Option Agreement, which provides for MCA to grant to Matsushita an irrevocable option to purchase 16,880,788 shares of MCA stock at a price of $71 per share in the event that (1) a third party commences a tender offer for 50% or more of MCA's stock, (2) a third party acquires 33% or more of MCA's stock, or (3) the MCA Board withdraws or modifies its recommendation or approval of the Merger;

b) The Capital Contribution Agreement, which provides for defendant Wasserman to contribute 4,953,927 shares of MCA stock to Holding in exchange for Holding preferred stock. Under this agreement, Wasserman, unlike the public stockholders of MCA, will receive consideration for his MCA stock in a tax-free transaction;

c) The Tender Agreements, which provide for defendants Sheinberg and Geffen to tender their MCA stock into the Tender Offer; and

d) The Distribution Agreement, which provides for MCA to spin off WWOR-TV to its stockholders. The Distribution agreement also calls for WWOR-TV to adopt a

"share purchase rights plan," or poison pill, acceptable to defendants following the Merger.

32. As detailed in paragraph 9, above, the Merger also provides for substantial payments and other benefits for certain of the Individual Defendants that will not be shared by MCA's public stockholders. For example, defendant Sheinberg will receive a $21 million cash bonus, plus a reported $9.6 million in "incentive awards." Sheinberg also will receive an enhanced salary of $8.6 million per year under the Merger Agreement, up from approximately $900,000 under his prior contract with MCA. Defendant Wasserman will receive an enhanced salary of at least $3 million per year under the Merger Agreement, up from less than $900,000 under his prior contract with MCA.

33. Additionally, defendant Wasserman, unlike the public stockholders of MCA, also will receive new preferred stock in Holding in order to reap the substantial, additional benefits of a tax-free transaction. MCA's public stockholders do not have the opportunity to participate in any such tax-free exchange. Defendant Wasserman's Holding preferred stock will pay a dividend of $28.6 million per year, up from the over $3 million he currently receives annually. Finally, other senior officers of MCA will receive "bonuses" and "incentives" totalling almost $55 million in the Merger, as described above in paragraph 9.

34. The Tender Offer and Merger are timed to take advantage of a temporary downturn in the price of MCA common stock. MCA's stock price has recently declined primarily due to the initial problems experienced in opening

the Florida theme park, the dilutive impact of the Geffen acquisition, and temporary world economic conditions. Shortly prior to announcement of the Merger discussions in September, 1990, MCA stock traded at approximately $34 to $35 per share. However, in 1989, the stock traded at prices considerably above the $66 Tender Offer price. The Tender Offer and Merger will occur at a time when the Company is poised to enjoy significantly increased earnings in the future, as the operations of the Florida theme park are stabilized and the beneficial impact of the Geffen acquisition is realized.

35. The intrinsic value of the Company materially exceeds the $66.00 per share and WWOR-TV stock value which Matsushita will pay in the Tender Offer. Given the Company's potential growth and profitability, the underlying strength of its assets, growth plans, resources and accessibility to public and private financing, the price to be paid to the public stockholders is unfair and inadequate.

**DEFENDANTS' BREACHES OF THEIR DUTY OF CANDOR**

36. Defendants have breached and continue to breach their duties of candor to MCA's public stockholders by failing to disclose adequately material information concerning the Tender Offer and Merger. Under Section 4.06 of the Merger Agreement, MCA has the opportunity to review and comment upon Matsushita's Offer to Purchase and Schedule 14D-1. Moreover, all defendants acted in concert with and/or aided and abetted one another in filing and disseminating Matsushita's Offer to Purchase, Schedule 14D-1 and Schedule 14D-9. Finally, MCA's 14D-9

disseminated the Offer to Purchase as an exhibit thereto. Therefore, all defendants are responsible jointly for the inadequate and misleading disclosures provided to MCA's stockholders in connection with the Tender Offer and Merger.

37. Defendants have breached their duties of candor to MCA's public stockholders by failing to disclose adequately the nature and circumstances of the substantial benefits that the Individual Defendants will receive in the Merger. The Offer to Purchase and Schedules 14D-1 and 14D-9 give the misleading impression that Sheinberg's, Wasserman's and certain of the other Individual Defendants' lucrative employment and bonus agreements, as described above in paragraph 9, were imposed "as a condition to Matsushita's willingness to agree to enter the Merger Agreement. . . ." and are not substantially greater than they would be if not for the Merger (See Offer to Purchase; Schedule 14D-9 at 23-26). In fact, Sheinberg's, Wasserman's and the other Individual Defendants' personal benefits from the Merger were insisted upon by MCA management as the price of its willingness to negotiate with Matsushita and are far greater than the Individual Defendants could have expected to receive in the ordinary course. Matsushita willingly agreed to pay, and encouraged the payment of, such compensation because of its expectation that this would vastly limit the independence of senior management and the MCA Board in negotiating with Matsushita and thereby save the purchaser potentially hundreds of millions or billions of dollars in acquisition costs that a fully disinterested MCA Board would have insisted upon. The portrayal of the management benefits as consistent with ordinary practice and as proceeding from the wishes of the purchaser to secure the services of the

present MCA officers and directors is materially false and deceptive and calculated to present a neutral or positive impression of special arrangements, which create serious conflicts of interest that the defendants have attempted to conceal.

38. Defendants also have breached their duties of candor by failing adequately to disclose their intention to retain de facto control over WWOR-TV following the spinoff of that entity to MCA's stockholders in the Merger. The Offer to Purchase and Schedules 14D-1 and 14D-9 falsely suggests that WWOR-TV could be put up for sale on the basis of competitive bidding following the Merger. In fact, the provision in the Merger for a board of directors following the spinoff that will be dominated by MCA management and the planned implementation of a shareholder rights plan, or "poison pill" have both the purpose and effect of entrenching in the control of WWOR-TV the MCA designees, and preventing a sale of the television station on the basis of effective and competitive bidding.

39. Additionally, defendants have breached their duty of candor to MCA's public stockholders by failing adequately to disclose significant and material information about the various operating segments of MCA that has been concealed from the public stockholders but provided exclusively to Matsushita. The Schedule 14D-9 creates the false impression that such information would not be "material" to MCA's stockholders. In fact, such concealed information would be of significance to MCA stockholders who must make an informed election between exchanging their shares in the Tender Offer or Merger and a statutory appraisal proceeding.

Defendants' failure to disclose both the material nature of this information and the information itself constitute breaches of defendants' duty of candor.

40. Defendants also have breached their duty of candor by failing to disclose prior market contacts between MCA and other potential purchasers which would indicate to MCA's stockholders the level of market interest MCA could attract in an open and effective auction. The Offer to Purchase and Schedules 14D-1 and 14D-9 falsely indicate that "no party other than Matsushita had made or expressed any interest in making a proposal to acquire the Company . . . ." (See, e.g., Schedule 14D-9 at 40). Defendants have failed to disclose that interested purchasers were rebuffed by defendants when such potential purchasers refused to grant the Individual Defendants the generous personal benefits granted by Matsushita. Such information would materially assist MCA's stockholders in assessing the fairness and adequacy of the Tender Offer and Merger.

41. Finally, defendant Wasserman's equity participation in Holdings following the Merger demonstrates that the parties are engaged in a form of "going private" transaction subject to the disclosure requirements of S.E.C. Rule 13e-3, promulgated under the Exchange Act. However, defendants have not made the required filings with the S.E.C. which would be required to be made were they proceeding in accordance with Rule 13e-3. In particular, the Lazard investment banker's "book" has not been made publicly available as would otherwise be the case were the parties proceeding in accordance with the requirements of Rule 13e-3. Material information regarding the fairness and adequacy

of the proposed transaction has thus been withheld from the investing public. Delaware fiduciary duties of complete candor incorporate the requirement to make available in a "going private" transaction the materials required by Rule 13e-3.

**DEFENDANTS' BREACHES OF THEIR FIDUCIARY DUTIES TO MAXIMIZE STOCKHOLDER VALUES AND ACT IN THE BEST INTERESTS OF THE STOCKHOLDERS**

42. Defendants owe fundamental fiduciary obligations of complete candor to the Company's stockholders in connection with the Tender Offer and Merger. Defendants also owe fundamental fiduciary obligations to the Company's stockholders to take all necessary and appropriate steps to maximize the value of their shares in implementing such a transaction. In addition, the Individual Defendants have the responsibility to act independently so that the interests of MCA's public stockholders will be protected, and to conduct fair and active bidding procedures or other mechanisms for checking the market to assure that the highest possible price is achieved. Further, the directors of the Company must adequately insure that no conflict of interest exists between defendants' own interests and their fiduciary obligations to maximize stockholder value or, if such conflicts exists, to insure that all such conflicts will be resolved in the best interest of the Company's public stockholders.

43. In breach of their fiduciary duty, a majority of the MCA Board of Directors have financial or other conflicting interests in the success of the transaction. Senior management

are eligible to receive bonus and compensation payments immensely greater than they would otherwise receive under their present contracts. Mr. Wasserman has negotiated a very favorable agreement in connection with the Merger which will insulate him from costly taxes. Defendant Baker faces a significant conflict of interest because of substantial payments made to his law firm in connection with the Merger. Defendant Strauss similarly faces a substantial conflict of interest because of the dual representation by his law firm of Matsushita and MCA and in fact participated in the deliberations of the Board regarding the Tender Offer and Merger, although abstaining from voting on the Merger. Defendant Rohatyn cannot claim any objectivity with respect to his support for the Merger because of the multi-million dollar fees which Lazard — the principal financial advisor in the Merger and a firm in which Rohatyn is a General Partner — will receive in the event that the Merger is consummated. In addition, Lazard's "fairness" opinion is unreliable because of the agreement which Lazard has arranged, by which Lazard receives multi-million dollar advisory fees contingent upon the completion of the acquisition transaction.

44. MCA represents a highly attractive acquisition candidate which has drawn the interest of such international business enterprises as General Electric Co., and Capital Cities/ABC Inc., both of which were reportedly willing to pay in excess of $90 per share in an acquisition transaction. Additionally, MGM/Pathe Communications Corp. appears to have been rebuffed in its efforts to negotiate a higher offer with defendants. The preferential treatment accorded Matsushita by the Individual Defendants for their own gain

has deprived and will continue to deprive the MCA public stockholders of the very substantial premiums which proper exposure of the Company to the market could have provided.

45. The Individual Defendants have breached their fiduciary and other common law duties owed to plaintiffs and the other members of the Class in that they have not and are not exercising independent business judgment and have acted and are acting to the detriment of the Class in order to benefit themselves and other members of MCA senior management acting in concert with Matsushita.

46. As reported in the September 25, 1990 Wall Street Journal article prior to the merger agreement, "any transaction would have to have the blessing of Wasserman," MCA's Chairman of the Board. Defendant Wasserman, who is 77 years old, owns almost 7% of the outstanding common shares of the Company. In addition, the Wall Street Journal article reported that Matsushita "wants to keep MCA management in place" in conjunction with an acquisition transaction. More importantly, the lucrative salary, bonus and "incentive" agreements between Matsushita and the Individual Defendants as well as the preferential treatment accorded defendant Wasserman have deprived the Individual Defendants of their ability to judge independently and fairly the value of MCA. As a result, the Merger is not the product of arm's length negotiations and is not based upon any independent evaluation of the current value of MCA's common stock, assets or business. Rather, the Merger and Tender Offer price is being fixed arbitrarily by Matsushita in conjunction with MCA senior management as part of their unlawful plan and scheme to obtain the entire ownership of

the Company's assets and business at an unfair and inadequate price.

47. Contrary to normal and established procedures in implementing such transactions, defendants have apparently failed to created any "Special Committee" of fully independent and disinterested directors who will act objectively and in the sole and ultimate best interests of all stockholders in effectuating the sale of the Company.

48. Under the terms of the Capital Contribution Agreement, defendant Wasserman will receive preferred stock in a subsidiary of Matsushita in exchange for his holdings of MCA shares. The purpose of this agreement is to afford defendant Wasserman tax-free treatment not available to other shareholders, and to save Wasserman millions of dollars in taxes that would be due if he received cash. By providing defendant Wasserman with this preferential treatment in the acquisition, and by assuring that Wasserman received greater value per share than that available to other MCA shareholders, the Individual Defendants have breached their duty of loyalty to MCA and its stockholders and all defendants have effected illegal and impermissible discrimination among MCA's stockholders and the shares they hold.

49. The Individual Defendants have also failed to engage in a sufficient "market check" necessary to assure the fairness and adequacy of the Tender Offer and Merger terms. Since the commencement of discussions and negotiations with Matsushita in or about September 1990, MCA has been prevented from soliciting any competitive

expressions of interest or purchase proposals. In addition, the parties have clearly rejected any post-agreement "market check" by virtue of their refusal to extend the Tender Offer beyond the minimum required under federal regulations, by their adoption of the Option Agreement which provides Matsushita with a "lock-up" option, and by agreeing to break-up fees amounting to $125 million, among other restraints that prevent any genuine auction from developing. MCA remains prohibited from soliciting competitive expressions of interest and, while MCA may respond to any competitive proposals which are made, the limited time available and obvious allegiances of management and the Board of Directors inevitably will discourage genuine competitive bids from emerging.

50. Certain other aspects of the transaction confirm the fundamental failure of the MCA directors to obtain the best possible transaction unaffected by conflicts of interest. In order to facilitate the transaction with Matsushita, defendants have arranged to spinoff the WWOR-TV subsidiary to stockholders rather than investing the additional time and effort necessary to auction this subsidiary at the highest possible price and thereby generate maximum proceeds for the shareholders. In addition, the Distribution Agreement contemplates that the spun off company will adopt a "poison pill" in form acceptable to Matsushita and MCA. If this subsidiary were genuinely to be independent, it would be unnecessary to incorporate such provision in the agreements. The implementation of the poison pill under these circumstances is intended to prevent the emergence of an open and effective auction for the television station and to

assure that those persons chosen by the principals to manage the station will confront no challenge to their control.

51. Moreover, the MCA directors have agreed to an arrangement whereby the Yosemite subsidiary will be marketed at some later time and its earnings prior to the sale will be placed in escrow for the benefit of the National Park Service. The escrowing of the Yosemite profits for an indeterminate period is clearly calculated to assuage public sentiment concerning the transaction and allow the defendants to achieve their personal agenda in consummating the sale under the agreed terms. A sale to another purchaser may not engender such public sensitivities and under those circumstances, the value of the Yosemite subsidiary would unquestionably be reserved for the shareholders.

52. Defendants also have failed or refused to take those steps necessary to ensure that the Company's stockholders will receive maximum value for their shares of MCA stock. Defendants failed to announce any active auction or open bidding procedures best calculated to maximize stockholder value in selling the Company.

53. In addition, despite the possible interest of several companies in acquiring MCA, defendants favor an acquisition of the Company by Matsushita which expressed a firm desire to maintain the Individual Defendants and other members of MCA senior management (with whom they are allied) in their positions of control subsequent to the consummation of the Merger. As a result, the Individual Defendants are acting to entrench themselves in their offices and positions and to receive enhanced and substantial salaries

and perquisites, all at the expense and to the detriment of the Company's public stockholders.

54. The Individual Defendants were induced to sell MCA to Matsushita for a grossly inadequate price by Matsushita's payment of the above described substantial payments and benefits to the Individual Defendants, at a time when MCA's common stock was temporarily under-rated as a result of, inter alia, the Company's expansion plan and a temporary decline of the stock market due to world events. As a result, the Individual Defendants are faced with substantial conflicts of interest between the best interests of MCA's stockholders and their own financial gains and continued employment.

55. By the acts, transactions and courses of conduct alleged herein, the Individual Defendants, other than MCA, individually and as part of a common plan and scheme in breach of their fiduciary duties and obligations, have and will unfairly deprive plaintiffs and the other members of the Class of their investment in MCA and to ensure continuance of their positions as directors and officers and enhanced compensation, all to the detriment of the Company and its stockholders. The Individual Defendants have been engaged in a wrongful effort to entrench themselves in their offices and positions of control and prevent the acquisition of the Company except on terms which would further their own personal interests.

56. These events represent the culmination of an entire plan and scheme by which the Individual Defendants have sought to isolate themselves from any acquisition of the

Company except under circumstances directly serving their personal interests at the expense of MCA's public stockholders. Previously, in July 1987, MCA implemented a stockholder rights plan (or "Poison Pill") designed to deter unsolicited takeover bids by making any hostile takeover attempt prohibitively expensive. The Poison Pill was subsequently modified on March 1, 1988 and December 6, 1988, to lower the trigger points at which the plan is activated and otherwise intensify its deterrent impact, thus magnifying the Individual Defendants' power to resist unwanted third party offers.

57. The Individual Defendants have also caused or taken advantage of other entrenchment devices designed to repel any takeover effort not endorsed by them. Among other things, MCA's certificate of incorporation provided for a staggered Board of Directors. Further, the Company entered into lucrative severance agreements ("Golden Parachutes") with five executive officers of MCA, including defendants Wasserman and Sheinberg. The Golden Parachutes provided for cash payments of million of dollars triggered by, among other things, any change in control of the Company. These Golden Parachutes were designed to make an unfriendly acquisition of the Company economically disadvantageous.

58. In addition, defendant Wasserman exercised voting and investment power as to approximately 6 million MCA shares in addition to the approximately 5 million shares which he personally owned. These additional shares were held in a series of trusts and charitable associations over which Wasserman served as a trustee or otherwise exercised control. Aggregating the shares owned directly by

Wasserman with those over which he exercised voting and investment powers as a trustee or in similar capacities, the MCA directors and officers as a group beneficially owned in excess of 13 million MCA shares, constituting approximately 18% of the outstanding common stock. Such aggregate ownership and control reposed in senior management was deliberately structured to frustrate an unwanted bidders' ability to meet the requirements of the Delaware Anti-Takeover Statute.

59. In this regard, in order to meet the requirements of the Delaware Anti-Takeover Statute, 8 Del.C. §203 (the "Delaware Act" or the "Act") for the prompt completion of a second-step "business combination", Section 203(a) requires that (i) prior to purchasing 15 percent or more of MCA common stock, any potential acquiror of the Company obtain approval from the MCA Board of Directors of the proposed "business combination;" (ii) a third party acquire in a single transaction a sufficient number of shares of MCA common stock to go from an ownership position of under 15% to one of over 85% (the "85% Exception"); and (iii) after obtaining 15%, the potential acquiror obtain the approval of the MCA Board and 66-2/3% of the other stockholders to the subsequent "business combination."

60. The ownership and control of MCA stock by the Individual Defendants and senior management therefore effectively placed under their control in excess of 15% of the Company's common stock, thereby preventing a hostile bidder from satisfying the 85% Exception. This had the intended and inevitable effect of frustrating an unsolicited

bidders' efforts to acquire the Company and predictably shifts corporate power to the hands of entrenched management.

61. By virtue of the acts and conduct alleged herein, the Individual Defendants, who control the actions of the Company, have carried out a preconceived plan and scheme to place their own personal interests ahead of the interests of MCA's public stockholders and thereby entrench themselves in their offices and positions within the Company. The Individual Defendants have violated their fiduciary duties owed to plaintiffs and the Class, including their fiduciary duties of complete candor, in that they have not and are not exercising independent business judgment and have acted and are acting to the detriment of MCA's public stockholders for their own personal benefit.

62. The Individual Defendants have breached their fiduciary duties by reason of the acts and transactions complained of herein, including their decision to effect the Merger with Matsushita without making any effort to obtain the best offer possible, by affirmatively attempting to prevent a better offer, and by failing to disclose material facts to MCA's stockholders.

63. As a result of the actions of the Individual Defendants, plaintiffs and the other members of the Class have been and will be damaged in that they have not and will not receive their fair proportion of the value of MCA's assets and business and/or have been and will be prevented from obtaining a fair and adequate price for their shares of MCA's common stock.

64. Defendants have subjected MCA to potential liability under the federal securities laws, thus causing MCA to expend and waste corporate assets that could otherwise be utilized for the benefit of MCA's public stockholders.

65. Plaintiffs seek preliminary and permanent injunctive relief and declaratory relief preventing defendants from inequitably and unlawfully depriving plaintiffs and the Class of their right to realize a full and fair value for their stock at a substantial premium over the market price, and to compel defendants to carry out their fiduciary duties of candor and to maximize shareholder value in selling MCA.

66. Plaintiffs and the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can plaintiffs be fully protected from the immediate and irreparable injury which defendants' actions threaten to inflict.

67. Unless enjoined by the Court, defendants will continue to breach their fiduciary duties owed to plaintiffs and the other members of the Class, and/or aid and abet and participate in such breaches of duty, and will consummate the Tender Offer and the Merger with inadequate disclosure and at an inadequate and unfair price, or upon inequitable terms, all to the irreparable harm of plaintiffs and the other members of the Class.

68. Plaintiffs and the Class have no adequate remedy at law.

*Appendix D*

**WHEREFORE,** plaintiffs demand judgement as follows:

(a) Declaring this to be a proper class action and certifying plaintiffs as representatives of the Class;

(b) Ordering the Individual Defendants to carry out their fiduciary duties to plaintiffs and the other members of the Class by announcing their intention to:

i) cooperate fully with any person or entity, having a bona fide interest in proposing any transaction which would maximize stockholder value, including, but not limited to, a buyout or takeover of the Company;

ii) undertake an appropriate evaluation of MCA's worth as a merger/acquisition candidate;

iii) take all appropriate steps to enhance MCA's value and attractiveness as a merger/acquisition candidate;

iv) take all appropriate steps to effectively expose MCA to the marketplace in an effort to create an active auction for MCA;

v) act independently so that the interests of MCA's public stockholders will be protected;

vi) adequately ensure that no conflicts of interest exist between the Individual Defendants' own interest and their fiduciary obligation to

maximize stockholder value or, if such conflicts exist, to ensure that all conflicts are resolved in the best interests of MCA's public stockholders; and

vii) adequately disclose the personal interests of and benefits to the Individual Defendants in the Merger;

viii) declaring that defendants and each of them have committed or aided and abetted a gross abuse of trust and have breached their fiduciary and other duties to plaintiffs and the other members of the class;

ix) preliminary and permanently enjoining defendants and their counsel, agents, employees and all persons acting under, in concert with, or for them, from proceeding with, consummating or closing the proposed transaction which will irreparably harm plaintiffs and the class;

x) in the event the proposal is consummated, rescinding it and setting it aside, or awarding rescissory damages if it cannot be set aside;

(c) Ordering the Individual Defendants, jointly and severally, to account to plaintiffs and the Class for all damages suffered and to be suffered by them as a result of the acts and transactions alleged herein;

(d) Awarding plaintiffs the costs and disbursements of this action, including a reasonable allowance for plaintiffs' attorneys' and experts' fees; and

*Appendix D*

(e) Granting such other further relief as may be just and proper under the circumstances.

Dated: December 14, 1990

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